SECTION I.—GENERAL PRINCIPLES.

§ 1.—*What is a contract.*

The Contract Act commences with a series of definitions. I always use terms exactly in the sense which the Act defines them to have.

Some of them it is particularly important to remember; for example, "contract" by itself, means *an agreement which is enforceable by law.*

I said the Contract law depends not on any existing relation between two persons, but comes into play when these persons establish the connection between them of their own accord.

This connection is set up in the first instance by one of them making a *proposal* to the other.

§ 2.—*The Proposal—the Promise.*

A proposal means that one person signifies his willingness to do, or abstain from doing, something *with a view to the other person assenting* to his doing it (and probably making a proposal on his part to do something or pay something in return). It is essential that the proposal should be made to evoke an *assent* from the other person[2]. When that person *assents*, the proposal becomes a *promise.* The person proposing is the *promisor*, and the acceptor is *the promisee;* thus these two persons are brought into a relation which is the foundation of a contract.

It is obvious that a proposal must be accepted and the acceptance known to the proposer before it ripens into a *promise*, and hence there is always a possibility of the proposal being revoked. This can be done of course by communicating a distinct notice of revocation.

But a legal revocation is also held to take place if the person to whom the proposal is addressed has not accepted within the time specified in the proposal, or if no such time is specified by

[2] *e.g.*, a man might signify his willingness to do something, and yet if he did not do so to obtain the other's assent, he would not make a proposal; as if he said to another, "I am ready and willing to give you a beating."

the lapse of a reasonable time (which is a question of a fact to be considered according to the circumstances) without communication from the person addressed. (Act IX of 1872, section 6.)

And so by failure to accept a condition precedent to acceptance, as if A writes to B that if he will withdraw a certain advertisement, or cease legal proceedings, he will do so and so, and B does not withdraw, or cease the proceedings, the proposal is revoked. So by the death or insanity of the proposer, if the addressee hear of this before accepting.

So much for the proposal; acceptance to be valid must be absolute and unqualified. Of course the acceptor may attach certain conditions, but if these are clear, they form reciprocal proposals requiring acceptance in their turn; it does not matter how many proposals and acceptances there are on either side, provided each proposal finds its corresponding definite acceptance[3].

Performance of the conditions of a proposal, or acceptance of any consideration for a reciprocal promise, which may be offered with a proposal, is an acceptance. If I say to a man I will give you 100 rupees if you will go to Lahore and do so and so; if he takes the 100 rupees, though he does not say he will go, he has accepted the proposal; so if he goes without saying that he accepts, he is entitled to get the 100 rupees. So if a contractor says, I will cut you up as many sleepers as you like from wood in such a forest at 1 rupee each, you may not at the time say you will give an order, but if you do, and he takes the order, he is bound to the rate specified.

An acceptance or proposal may be express or implied.

If you go into a shop and take up a cake exposed for sale and eat it, though neither you nor the shopman have spoken, there is an implied proposal of the shopman to sell it at a reasonable price, and an implied acceptance on your part to buy it and pay the reasonable price.

[3] The acceptance must correspond to the offer exactly. If A offer to take B's house from 25th July, it is not an *acceptance* from B to reply that he will give it from 1st August.

§ 3.—*Implied Terms of Contract.*

It often happens in contracts that some of the terms are implied. If a watchmaker proposes, and you accept his proposal, to clean your watch, it is implied that he does the work in a workmanlike manner, and does not return the watch scratched all over with tool-marks (for example). What the implied contract is, or what the terms in a contract (otherwise expressed), really mean, "must be in each case collected from the surrounding circumstances; generally, there is some usage or custom which leaves no doubt as to the intention of the parties, and when this is not the case, the promise to be implied may generally be gathered from a consideration of what it is probable, under the circumstances, that the party should promise[4]."

The student will remember that an important instance of an implied promise occurred in considering the legal position of a forest officer on appointment. In accepting service he *implies* a promise to abide by all the rules of service and lawful orders of his superiors, and to accept pay, pension, dismissal, or other penalty for misconduct, as those rules provide.

§ 4.—*Quasi-contracts.*

I may here just allude to cases which are spoken of as *quasi-contracts*. These arise in cases where there are relations between two persons, which closely resemble those created by contract, though no such contract (except, if you like to say so, by a fiction of the law) exists. These are treated of in Chapter V of the Act. A familiar instance is where you find some property and take it into your custody; here you are bound to try and find the owner and to act in short, as if it had been deposited with you (bailment) by some one on a distinct contract. Another case is where money is paid or goods are delivered by mistake, or under coercion. The law lays upon the recipient the duty of restoring the property just as if he had received it and agreed to give it back.

[4] Cunningham and Shepherd, Indian Contract Act, page 44.

§ 5.—*In Contract, usually one Promise against another.*

Where one party makes a proposal and the other assents, there is, as we have seen, a legal *promise;* one party is the *promisor*, the other is the *promisee.*

Where a man makes a promise to do something[5] it is usually because the *promisee has done,* does, or in his turn *promises to do,* something which the other wants done or is benefited by. This thing done or to be done, is the motive for the promisor's promise, and is in legal language called the *consideration* for it. This will be found to be very important, because, speaking generally, if a man assents to a proposal, that is makes a promise, and there is no legal motive or "consideration" for it, he is not bound at law to fulfil the promise.

The 'consideration,' as I said, may be past, present, or to come. Example (1)—I promise to pay you 1,000 rupees now, because last year I asked you to pay, and you paid, the rent of a house on behalf of my family at Simla; (2) I agree to pay my bookseller 10 rupees for the book which I take and put into my pocket, whenever he chooses to send me the bill; or, take a *negative* case, I withdraw a suit filed against you and you agree to pay the debt one month hence with 12 per cent. interest; (3) I promise to pay you 5,000 Rupees three months hence for goods coming out from England, which you agree to deliver to me when they arrive.

Every promise (consisting of proposal and acceptance) of course constitutes an "agreement" though a bare "agreement" might not be enforceable at law, and therefore not a *contract* within the meaning of the Act; and where one promise is made against another promise, this set of two promises makes one agreement, and, as here the one promise is the consideration for the other, we have a *contract* provided that certain further requirements are fulfilled.

[5] Or not to do something. I do not complicate the sentence by always introducing the negative; but it is obvious that a man may desire to have a thing not done, as well as to have a thing done, *e.g.*, I may propose to a man *not* to proceed to sue me in Court, and I will do so and so for him.

§ 6.—*Agreements which are Contracts, i.e., are enforceable at Law.*

In order that an agreement should be enforceable (*i.e.*, "a contract") certain things are necessary—

(1) Each party must be *competent* to act, and
(2) Each party must *consent* of his *free* will;
(3) The *consideration* must be *lawful, i.e.*, the promise on one side, or the thing done, must be lawful,
(4) The *object* must be *lawful*, the promise on the other side or the thing done, must be lawful),
(5) The whole agreement must not be of the classes which the Act expressly declares to be void,
(6) Lastly, if there is any law requiring any particular contract to be in writing or to be registered, it must be so.

§ 7.—*Competence to Contract.*

Persons are competent if they are of *age, i.e.*, not minors according to the law to which they are subject, as Europeans, Hindus, Mahomedans, &c.[6]

The rules are various, but it will be *safe for general purposes* to ascertain that the person contracted with is not under 18 years of age, if he is not in charge of a Court of Wards (as in that case he is a minor till 21 years). With Europeans also, 21 may be the age. The law is too complicated to explain in detail in this place.

They must be of *sound* mind.

"A person is said to be of sound mind for the purpose of making a contract, if *at the time when* he makes it, he is capable of understanding it, and of forming a rational judgment as to its effects upon his interests."

"A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind."

"A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

[6] The laws about *minority* are given in Cunningham and Shepherd, Indian Contract Act, under section 11 (page 50, &c., 3rd edition, Calcutta, 1878).

Illustrations.

(*a*) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(*b*) A sane man, who is delirious from fever, or is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract while such delirium or drunkenness lasts[7]. (Indian Contract Act, section 12.)

The person must not be incapable by any law, of contracting. This will principally concern the case of contracts with married women. If the contractor is an European British subject, the consent of the husband should be obtained, as it will save all difficulty. But contracts regarding a woman's separate property are valid if made by her alone. It is, however, impossible for the student to go into detail on this matter, and legal advice should be taken on the particular points of any case which arises.

If the contracting party is a married woman, either Hindu or Mahomedan, it is, as a matter of precaution, hardly safe to accept a contract without the husband's consent. It is certainly not clear, at any rate under Hindu law, to what extent a married woman can contract alone, and the Mahomedan law is also against such freedom.

§ 8.—*Consent of Free Will.*

"Two or more persons are said to consent when they agree on the same thing *in the same* sense." (Section 13.) People should be sure that they are agreeing about the same thing, not about different things under the same name, or there is no consent or agreement. Mr. Cunningham gives the case of two persons who agreed to buy and sell respectively, the cargo of a ship called the *Peerless*, and it turned out that there were two ships of this name, both sailing from Bombay at different dates; each party meant a different ship. It was held there was no agreement between them.

But this will not enable excuses to be made where there is a definite description or expression of the meaning in a written

[7] In this the Indian Act departs somewhat from the English law; there, drunkenness, if purely voluntary and not made use of to mislead the person, will not make a contract void, at least not absolutely or necessarily.

contract. Under the Evidence Act (section 91), the terms of a contract reduced to writing are to be proved by the writing itself, and verbal evidence cannot be offered to vary or contradict the terms of it. Nor, even if the contract was in words only, can a person, who, by his declaration, act, or omission, has caused another to act in a certain way, turn round and prove that his declaration was untrue.

Consent must be *free*, that is, must not be obtained by "coercion" (defined in section 15); "undue influence" (defined in section 16); "fraud" (defined in section 17); "misrepresentation" (defined in section 18); and "mistake" (subject to the provisions of sections and 22)[8].

"Coercion" is (briefly) doing or threatening any act which is forbidden by criminal law, detaining or threatening to detain any property to the prejudice of any person, so as to make any person enter into the agreement.

"Undue influence" is much more difficult to understand, and it will be necessary to get good advice in any case in which such a plea is raised as invalidating a contract. It may occur in cases where one person has an ascendancy over another, or where one person places great confidence in another, or where there is real or apparent authority, and where the influence so obtained is used to the deprivation of the person acting under such influence, of his freedom of choice. It is also using undue influence to take advantage of old age, infirmity, illness, or distress, mental or bodily, so as to get a consent which could not otherwise be given. Speaking very generally—coercion refers to "physical" inducements and undue influence to "moral."

§ 9.—*Fraud.*

"Fraud," as a cause vitiating the agreement by affecting free consent, would require an essay to itself to explain it properly: but I think the section 17 will be sufficiently plain to the student to

[8] I do not for the sake of space print these sections; they can easily be referred to on occasion, in the Act itself.

enable him to grasp the ruling involved. In *fraud* there is some real culpability and dishonest intention, while in *misrepresentation* there may be a mistake only. Both may operate to make the consent *not free*, and therefore to make the agreement unenforceable.

It is necessary that the fraud should be either directly by a party to the agreement or his agent, or some one in connivance with him. If it directly affects the ground of the whole contract, the contract will be voidable at option of the party suffering the fraud. The fraud may, however, only affect some part of the contract and not go to the ground of it, and thus it may not have the same effect. There may be a fraud *in act*, or *in word*, or a fraud in *concealment*. If, for example, I wish to sell a lot of teak logs which I know are riddled with insect holes, and carefully fill them up with wax, colouring the surface and passing a comb over it to restore the grain of the wood, and say nothing about the defect, or, if I sell you a lot of sealed and marked bottles of wine which I know contain only coloured water, this is fraud by concealment.

But it may not necessarily be fraud merely *to keep silence*. "Here," says Mr. Justice Cunningham, "the question whether the silence is fraudulent or not depends entirely on the relation of the parties: traders for instance, as a general rule, deal with each other at arm's length, and are understood to be under no obligation to volunteer information about the matter of the contract. On the other hand, there are cases where it is the duty of each party, not only to tell the truth, but to tell the whole truth, and when accordingly the mere failure to mention a fact may constitute fraud;" such is a case of marine insurance by an underwriter.

It may be the case that although a silence about defects or other features of a transaction may be fraudulent, the effect of the fraud will not be to render the contract voidable, *if the other party had the means*, by use of ordinary care and diligence, of discerning the truth. But this only applies to cases of *silence*, not to any actual fraudulent mis-statement: this will *always* render the contract voidable.

§ 10.—*Misrepresentation.*

Misrepresentations are—(1) positive statements by one party *even though he believe them* true, if made without the degree of information which warranted belief; (2) any breach of duty on his part, putting the other at a disadvantage or misleading him to his prejudice; and (3) causing the other to make a mistake as to the subject-matter of the agreement.

The effects of fraud and misrepresentation are equally to make the contract voidable at the option of the party misled, but misrepresentation, like fraudulent *silence*, will not avail if the means of discovering the *truth* were available. A person misled *need* not void the contract, he has another remedy: he may insist on the other person fulfilling the contract, in such sense that he is put in the same position as he would have been had the mis-statements been true; in other words he may insist on the party making good the untrue statements by means of which he induced him to enter into the contract.

§ 11.—*Mistake.*

The last means by which legal freedom of consent is hindered is *mistake*. If both parties are under a mistake, as in the instance of the cargo of the ship *Peerless*, there is no consent and the contract is void.

The mistake must not be a more erroneous opinion about the *value* of a thing, and it must be a mistake of *fact*, not of its *law*; and it must affect *both* sides. A mistake by one side (not being, or amounting to evidence of, fraud or misrepresentation) will not affect the contract. (Sections 20, 21, 22.)

§ 12.—*Lawful Object and Consideration.*

The next essential to a valid contract is that the "object" and the "consideration" should be lawful. I have explained what the consideration is, and the object is what is to be done for the consideration. Hence, in contracts where there is a promise on each side, either thing promised becomes the object to one party and the consideration to the other. A agrees with B to saw up 1,000 trees

into logs for 2,000 rupees. Here, as regards A, the sawing is the object and the payment of Rs. 2,000 is the consideration; as regards B, the payment is the object and the work to be done the consideration. That which is from one party's view the object, is from the other's the consideration, and *vice versâ*.

All contracts are said to have their object or consideration lawful unless either object or consideration is—

(1) forbidden by law (*Example*, to make 1,000 false notes for a payment of 500 rupees or to drop a prosecution for a robbery on receiving a certain sum);

(2) of such a nature as to defeat the provisions of any law, *e.g.*, an agreement by a forest officer (who is not allowed to buy timber at a Government auction) to pay so much if some other person will buy the timber in his own name and hand it over to the officer;

(3) fraudulent (*Example*, an agent agrees with some person in consideration of receiving a gratuity, to obtain a lease of land at a low rate from his principal for the other);

(4) involves or implies injury to the person or property of another. (*Example*, a contract with a printer to print and publish a pamphlet, libelling a certain person in consideration of a money payment: or a contract by a person with a forest office munshi that he shall induce the Divisional officer to give contracts to that person, the munshi getting a percentage);

(5) is regarded by the Court as immoral or as opposed to public policy. (*Example*, an agreement with a man to allow his daughter to live immorally with the other party in consideration of a money payment[9].)

§ 13.—*Void Agreements under the Act.*

Next, besides these general grounds of unlawfulness of object or consideration, the Act itself has expressly declared certain agree-

[9] See also the illustration to section 23.

ments to be void. It will not be necessary, for the practical purposes of the forest officer, to notice any of these except the following:—

(1) that agreements absolutely without consideration are void, except under certain conditions;

(2) that agreements are void, absolutely restricting the right of either party to have recourse to legal tribunals, or limiting the time within which they may have such recourse.

The exception to this latter is an agreement to refer a matter to arbitration, and that only the amount awarded shall be recovered.

Such an agreement is valid, and an action for damages will lie[10] and if the person who had contracted to refer to arbitration were to bring a suit in respect of the subject he had contracted to refer, the suit would be barred. He could, of course, sue for the amount awarded him, because the contract to abide by the arbitration has been fulfilled.

(3) Agreements, the meaning of which is not certain and cannot be made certain, are void[1].

(4) Agreements by way of wager are void. A few other void agreements may be gathered from other parts of the Act.

Thus agreements to do an impossible act (section 56) are void[2]. And so agreements to do an act which becomes impossible, as when a singer contracting to sing loses his voice, or a war breaks out which renders a contract impossible of performance.

[10] But the clause in the Contract Act, saying that such an agreement could be ordered to be specifically performed by the Court, is repealed (see Specific Relief Act I of 1877, section 21, and schedule II to the Act).

[1] The question when evidence is admissible to clear up an ambiguous document is settled by sections 93-7, Indian Evidence Act.

[2] But if one party knew of the impossibility and the other did not, the first would be bound to confess it; as if A agrees to marry B, not knowing that B is already married to C, and is subject to a law which prohibits polygamy, and so the contract is impossible, A may be entitled to compensation. And it is to be remembered that a contract is not wholly impossible because part of its subject-matter existing at the time has ceased to exist. (Section 13, Act I of 1877.)

Promises which include what is partly legal and partly illegal are dealt with in sections 57 and 58.

§ 14.—*Remarks on Agreements without Consideration.*

Having disposed of these cases of void agreements, I return to offer some remarks on the *absence* of *consideration.*

The general rule is that if there is no consideration the agreement is void—is not in fact, adopting the definition of the Act, a "contract." (Section 25.) But to this there are some intelligible exceptions—(1), if the parties have put their intention beyond mistake by reducing their contract to *writing* and have got it *registered* under the law for the registration of assurances, *and the contract is made on account of the natural love* and affection between parties standing in a near relationship; (2), if it is a promise to compensate a person who has voluntarily [3] done something for the promisor of something which the promisor was legally compellable to do (as *e.g.*, he paid a tax to save his property from attachment and sale); (3), if the contract (which must be in writing) is to pay a debt, which would be a lawful debt, claimable but for the effect of the limitation law.

A *gift* actually made, as between the donor and donee, is not rendered invalid by this provision of the law.

The above relates to agreements absolutely without consideration, but not to contracts where the consideration exists, but is inadequate. Mere inadequacy is not a ground for voiding the contract; but if the free consent is denied, it may be taken into account by the Court in considering whether the consent was freely given. The illustration in the Act is the case of a person agreeing to sell a horse worth Rs. 1,000 for Rs. 10. If there was no question about the parties having consented, the contract would not be void, but if the person who agreed to sell denied that he had freely consented, the gross inadequacy of the price said to have been agreed

[3] *i.e.*, of his own will without being asked by the promisor, otherwise there is a consideration. (Section 2*d*.) The previous request made and fulfilled is the consideration for the present promise to do something.

on would be an important point in judging whether the consent was free or not.

§ 15.—*Contract when to be in writing.*

The last legal requisite for a 'contract' is that it should be in writing, *if* any law specially so require it, and registered *if* the Registration Act (III of 1877) requires it to be registered. The only contracts that are required to be in writing are those special kinds of document mentioned in several Acts of the Legislature. Not any of these concern or can come under a forest officer's notice in any way, nor am I aware that any kind of contract which a forest officer is likely to be concerned in is required by any *law* to be in writing[4]. Consequently, as far as *legal validity* is concerned, all contracts may be verbal. We have no such law as the English Statute of Frauds requiring certain kinds of contracts to be in writing, or "under seal."

No doubt it would be very foolish (as a matter of practice) not to commit a contract to writing, especially as there might be great disputes and difficulty of proof afterwards, and therefore service and local rules often require that forest officers should reduce all contracts to writing if dealing with more than a certain value. But that has nothing to do with the *legal* validity of a verbal contract. A contractor could not come into Court and say, I deny my liability on this contract, because, according to Conservator's order to his subordinates, approved by Government, this contract is over such and such a value and therefore ought to have been written.

So also there may be a law that *if* the contract is in writing it must be registered, if, for example, private persons chose to execute a written lease or sale of land or house of Rs. 100 in value, they *must* register: and the contract would not be valid otherwise, because the writing could not be offered in evidence, and a verbal agreement would not be admitted when the parties had made

[4] In provinces where the Transfer of Property Act (IV) of 1882 is in force, certain sales and mortgages of immovable property must be in writing.

a writing on the subject. But they are not *obliged* to have any writing at all; and though there may be certain *advantages* conceded by the Registration law to registered documents over unregistered ones and oral contracts, this does not affect the legality of the contract itself. For example, if you mortgage to me verbally a house for a debt of Rs. 1,000 it might be *oral*[5], *but* (unless possession had actually been given), a registered deed of mortgage to another person would prevail against the unsupported oral mortgage. And if it was a case of a sale of a cottage for Rs. 80, which *need* not be registered, a voluntarily registered deed of sale of the same cottage would be given effect to *before* the unregistered one.

§ 16.—*Performance.*

Having now understood what agreements are legal contracts, the next important subject is the *performance* of contract undertakings. Each party must perform or offer to perform his promise, unless this is dispensed with by the other party, or is excusable by law (as will presently be explained.)

If the party dies, the heirs or representatives of the party are still bound to perform, unless a contrary intention appears from the contract (*ex.*, a particular painter agrees to paint a picture but dies before he does so, here his heir or representative may not be a painter at all, or not be as good a painter, and therefore it could not have been the intention of the contract that the representative should fulfil it).

When one party is ready to perform and has made an offer of performance, and the other does not accept the offer, he is no longer responsible, and does not thereby lose his rights under the contract: but the offer must be unconditional, and made at a proper time and place, and with proper opportunity to the other party to ascertain that the offer corresponds to what the contract bargains for. (Section 38.)

When a party to a contract has refused to perform, or disabled

[5] Except in provinces alluded to in the last note. See sections 9, 54, and 59 of the Act IV of 1882.

himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by act or word his assent to its continuance. (Section 39.)

In some contracts it is evidently the intention of the parties that either party should *himself* perform his part, otherwise a competent person may be employed to perform it. If performance by a third party is accepted, performance cannot afterwards be demanded of the party himself. (Sections 40-1.)

When there is a joint promise by several persons (unless a different intention appears by the contract), all the persons,—or after the death of one, the survivors, and the representative of the deceased,—and after the death of all, the representatives of all jointly, must fulfil the promise. (Section 42.)

But in such a case the promisee may (in the absence of express agreement to the contrary) make any one of the joint promisors perform the whole promise[6]; but the one so compelled has a right to claim contribution from the others in equal shares.

If one of a number of joint promisors is released by the promisee, the others remain liable, and the release, as regards the promisor, does not free the released person from liability to the other joint promisors. (Section 44.)

Joint promisees can claim performance on the same principle as that which applies to joint promisors under section 42. (Section 45.)

§ 17.—*Time and Place.*

In some contracts it is really important that they should be performed exactly at the time agreed on; in others it is not so, and often no time is specified at all.

If no time is specified, the performance must be within a *reasonable* time, which is a question of fact in each particular case. (Section 46.)

When the promisor has undertaken to do his part on a certain day, and without application on the part of the promisee, he must

[6] That is, every joint promise is presumed to be *joint and several*. This is different from the English law.

perform it in the usual hours of business and at the proper place; *e.g.*, a person promising to deliver goods on a certain day to a warehouseman in business, must perform this on the understanding that he delivers at the warehouse, and in usual business hours. A delivery at midnight or at some unusual place, would not be a performance. (Section 47.)

There are provisions in the Act regarding place of performance (when that is not stated) which will be found in sections 48-9, but need not be here detailed.

As a general rule about *place*, in the absence of express agreement, the place for the delivery of goods sold is the place at which they are at the time of sale, and if not in existence at the time, at the place at which they are produced. (Section 94.)

But in practice the question of *place* of performance rarely gives any difficulty.

There is a further rule about *time*, where it is essential and where it is not, which will be better understood when the rules which now follow have been understood.

§ 18.—*Order of Performance of reciprocal Promises.*

I have before remarked that in the great majority of contracts there is a promise on either side, each of which promise is the object of, or the consideration for, the contract, according as it is looked at from one party's point of view or the other's. It then becomes a question in what order these promises are to be performed. In this respect contracts have been by English lawyers classified under three kinds:—

(1) Where the two promises (or the two sets of promises of which there are several on either side) are to be performed simultaneously, &c. I agree to deliver 10,000 sleepers at Agra within three months and you to pay Rs. 30,000 on delivery;

(2) The promises are independent: each must fulfil his own independently of what the other does, and the remedy of either is *not* to forego *his* duty, but to sue the other for

damages (or, if the law be so, sue him for specific performance);

(3) One promise is by the terms of the contract to be performed first, and it is (what is called) a "condition precedent" that one should be performed before the other can be claimed.

The Indian Act has not adopted this classification, which in fact is the subject of much argument when it is attempted to be applied rigidly in practice; but it is useful to understand it in theory, and the idea of it is not altogether lost in the practical provisions of the Contract Act which follow.

For example, section 51 clearly applies to the first case (simultaneous performance); neither party is bound to perform unless the other is ready and willing to do his part simultaneously.

The same principle is also applied if the contract expressly states the order in which the promises are to be performed, or if the nature of the business clearly indicates it. (Section 52.) The parties must perform their parts in the order thus established. This is an instance of the third case—"condition precedent."

And section 54 further completes the subject: the party bound to do his part first, must do so; but if he fails or refuses, not only is the other party not bound to carry out his share, but he is entitled to claim compensation. *Example:* A agrees with a contractor B that B shall fell 2,000 trees and saw them up into sleepers, for a payment of so much per sleeper sawn, A agreeing to find the axes, saws, &c., necessary for the work. Here it is obvious that A's finding the tools is to come first in order: it is a condition precedent: if he does not, B is not bound to saw up the wood, and not only so but he can claim compensation for loss of reasonable profits on the contract. (See also section 75.) Where there is some order of performance indicated, it is not the intention that the acts should be simultaneous: then there arises the *second* case (independent agreements on each side), and each party must independently do his part without looking to the other, the remedy for either being to claim damages for the other's non-performance.

It is necessary here to observe that if one party *prevents* the other from doing his share, not only has that party no claim, but the party prevented can claim compensation. (Section 53.)

Not only must he not prevent, but he must give *reasonable facilities* to him to perform (section 67), *e.g.*, in a contract to repair generally; it may appear from the circumstances that the owner should point out the places where repair is needed; his failure would excuse the contractor, and so if he prevented or did not facilitate the repair, by the necessary moving out of furniture, and so forth.

These provisions, it is said, are more stringent than those of the English law, which, as a rule, inclines against avoiding the contract altogether and refers the injured party to compensation by damages.

§ 19.—*Time for Performance.*

In one case, however, the Indian law takes off the edge of the rule about failure to perform—*viz.*, in the case of *time* for performance—a rule which I reserved for consideration till now. If one promise is to be executed within a certain *time*, and then the other promise becomes due, the rule about performance is not applied in all its harshness, *viz.*, that failure in the first should render the contract at once voidable, with a claim to compensation by the other party: but it is equitably asked, did it really matter whether the promise being reasonably performed, it was not performed exactly in the time fixed?—is it fair to allow that if there has been a genuine though not precisely formal or strict performance, the other party should take advantage of such a formal error and void the contract and claim compensation, as under the rule I have described? The answer is no: the edge of the rule is equitably taken off by looking to the facts and intention of the parties. If it is clear that there was an express object in fixing a precise time, then any failure in regard to time is no longer formal but material, and the rule holds good: but if time was not essential, and the performance, though not technically to the day, has been good and useful, (even though the delay has somewhat injured the other party,) then that other party cannot void the contract and get off

his part (section 55, clause 2); nevertheless he is entitled to compensation for any actual injury caused by the delay: but he must, in accepting performance, give notice that he is going to claim such compensation. (Section 55, clause 3.)

Lastly, where under these circumstances, one party, owing to the failure of the other (sections 19, 39, 53-4), is entitled to rescind or put an end to the contract, and does so, the other party is released from performing his part specifically, but is in many cases still liable to pay compensation.

§ 20.—*Benefit received by Party rescinding the Contract.*

But the important rule is, that if the party having rescinded a voidable contract, has received *some benefit* (though not the whole intended result) from the other party, he is bound to restore that benefit, *i.e.*, to make it good. Supposing, for instance, owing to a failure of a contractor who had engaged to completely saw up, mark and launch 20,000 sleepers, the forest officer was obliged to avail himself of a lawful power to put an end to the contract, but 5,000 sleepers were lying cut in the forest but not launched, and 1,000 had been actually launched: here, although he had not the whole work done, it is obvious that he has had *some* benefit, and he must therefore, to use the words of the Act, "restore the benefit" and calculate a fair portion for the part of the work done and allow that. And this would still hold good even if the failure to supply the whole 20,000 sleepers caused a heavy loss in consequence of a failure to meet some Railway contract for sleepers in the plains: damages might be claimed, but subject to the adjustment of the benefit received. (Section 64.)

The same rule (section 65) holds where a contract is discovered to be void, or becomes void: any benefit actually taken under it must be restored. (*Example:* A pays B 1,000 rupees in consideration of B's agreement to marry C. A's daughter C is dead at the time. The agreement is void, but if B has received the 1,000 rupees he must repay it to A.)

§ 21.—*Appropriation of Payments.*

Connected with the subject of performance, is the case where a person has several debts to pay,—in other words, he has promised to pay several sums, and he makes a payment (*i.e.*, a part performance) without intimating to which debt or account he wishes it to be credited.

Of course, if any intimation is made or *appears from the circumstances*, the payment must be applied to such debt as is intimated. (Section 59.) But if not, the creditor may apply it to any *lawful* debt *actually due* and *payable, no matter* whether the debt is barred from recovery in Court by the Limitation law or not. (Section 60.)

If neither party makes an appropriation, a Court settling the account (for example) would apply the payment to the debts in order of time, or, if they are simultaneous, to each proportionately. (Section 61.)

§ 22.—*Contracts which need not be performed.*

We have considered how some agreements are void, and some are voidable. We now come to the case where something occurs in the course of a contract otherwise valid, which excuses or supersedes its performance.

One such case is rather important, namely, where there is a "novation" as it is called, or the substitution of a new contract, which is intended to supersede the old, so that the new one, and *not* the latter, has force. Such a substitution may either affect the whole contract, or some of its terms. Or it may be that a contract is rescinded altogether.

In all these cases the original contract can no longer be claimed. The alteration may affect terms, rates, time, place, &c., or the parties; the creditor may accept a new debtor and release the original one.

The rules of English law (some of which appear somewhat questionable) have not been altogether followed in the Act.

Any promisee may partly or wholly dispense with or remit

the performance of the promise made to him, and there is no technicality about this being "without consideration." A man who has a bond for Rs. 1,000, and chooses to accept a payment of Rs. 500 in lieu of it, is entitled to do so, and this waiver or dispensation may be made at any time before breach of the contract or after it[7].

Whenever a voidable contract is *rescinded*, the rescission must be communicated or revoked in the same way as a *proposal* which originates a contract may. (Sections 3, 4, 5, and 6.)

§ 23.—*Breach of Contract.*

The last subject to be considered in this sketch of the general principles relating to *all* contracts, is the consequence of a *breach* of a contract.

The result of a failure on the part of a promisor who is bound to fulfil *his* engagement first in order of time, we have already seen; it is to absolve the other party who has made a reciprocal engagement from fulfilling that engagement, and also to entitle him to compensation for loss of profits from the contract. If I agree with A that he will convey 500 tons of teak wood to a certain depôt, at the rate of Rs. 2 a cubic foot, and I am to *advance* him Rs. 25,000 and fail to do so, not only is A excused from conveying the wood, but he can claim compensation for the profits he proves he would have made on the contract.

And again, if one party having done his part, or being ready and willing to do it, according to the requirements of the case, the other party, without lawful excuse, fails or refuses to perform his part, here the latter becomes liable to pay damages for his breach of contract.

§ 24.—*Nature of Damages.*

It is obvious, however, that the "damages" or "compensation" thus easily spoken of, are not in all cases obvious or easily determined in an actual case of dispute.

[7] The English law draws a distinction here.

The first principle is that the damage compensated is that which naturally arises in the usual course of things, or one which the parties knew, when they made the contract, was likely to be the result of a breach of it. And the damage is direct and immediate, not indirect or remote.

This is a very necessary rule, for the effects of any act are really almost infinite, and if the law were to go into every possible ramification of consequence that ensued from a breach of some contract, there would be no end to the suit, and to the expense of the enquiry. Damages, therefore, not directly flowing from the breach are said in law to be "too remote" and will not be awarded.

An important 'explanation' to this section must here be noted. In some cases the *means of remedying the inconvenience caused by non-performance* may exist, and this may be important to take into account in estimating damages. For example (illustration *b*), A hires B's ship to go to Bombay and there take up a cargo which A is to provide, and bring it to Calcutta: B's ship fails to go to Bombay, but A got other conveyance on equally advantageous terms which answers his purpose, only he is put to some trouble and expense in getting it; here the damages A would get would only be compensation for the trouble and expense so incurred, the existence of the means of remedying the breach of contract here having obviated all the chief loss to be apprehended.

§ 25.—*Penalty. Liquidated Damages.*

It sometimes happens that persons put down in their contract that if there is a breach a certain *penalty* of fixed amount shall be payable. The English law was that this penal sum would not be decreed by the Court as long as it was an arbitrary *penalty*; and it was held to be so in all cases where the real damage, as distinct from the fixed sum, could be ascertained. But where it was in the contemplation of the parties that there would be great difficulty in estimating the actual damages, and that it was their intention to obviate this inconvenience by agreeing on and specifying a sum by way of *liquidated damages* as it is called, *then* this sum could be recovered.